

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**SCOTT R. KOEHLER**  
Claimant

VS.

**KWIK KAR LUBE & TUNE OF EMPORIA**  
Respondent

AND

**FEDERATED MUTUAL INSURANCE CO.**  
Insurance Carrier

Docket No. 1,023,163

**ORDER**

Respondent requests review of the August 2, 2005 preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

**ISSUES**

The Administrative Law Judge (ALJ) ordered respondent to reimburse claimant for medical treatment provided by Emporia Orthopedic Associates and ordered that Dr. George Fluter be authorized as claimant's treating physician.

Respondent requests review of the ALJ's order, claiming the ALJ should have allowed the parties to conclude the deposition of a witness, Stephanie Owen, which had been begun the day before the preliminary hearing, before rendering a decision. Respondent also argues that the ALJ erred in excluding a police investigation report as evidence. Respondent also denies the compensability of the injury, arguing there is no credible evidence a work-related accident occurred.

Claimant argues that respondent had time to schedule the deposition Stephanie Owen earlier but instead scheduled the deposition for the day before the preliminary hearing. Claimant contends that allowing respondent additional time to complete the deposition would unduly burden the claimant and delay his ability to obtain medical treatment. Claimant argued the ALJ correctly denied admission of an alleged police report into evidence because the report, although signed, was not authenticated and, therefore, lacked proper foundation. Claimant also argues the report consists of hearsay upon

hearsay. Claimant also argues that his testimony and the medical evidence support his claim that he had a compensable work-related injury. Claimant requests the order of the ALJ be affirmed.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant is 20 years old and worked for respondent as a mechanic and lube technician. He testified that on April 18, 2005, he was tuning up a car when a spark plug seized to the head, and when he broke it loose, he twisted his left arm and shoulder. He immediately notified his employer and filled out an accident report. Respondent sent claimant to a nurse practitioner, Leighton York, for treatment. Mr. York gave claimant a prescription to control muscle spasms and put him on light duty with limited lifting, pushing and pulling, no over-the-shoulder work and limited weight to 20 pounds. Claimant saw Mr. York a week later, and at that time, he restricted claimant from using his left arm. Mr. York eventually referred claimant to Dr. Michael Montgomery, an orthopedic surgeon. Claimant gave Dr. Montgomery a history of injuring himself while breaking a spark plug loose. He complained of pain starting at his shoulder and radiating down to his elbow and wrist. Dr. Montgomery recommended an MRI and physical therapy, however respondent refused to authorize the treatment. Claimant testified he went in for two physical therapy sessions but stopped when the treatment was not covered by respondent. Claimant paid Dr. Montgomery's bill out of his own pocket.

Claimant was examined by Dr. Michael Munhall at the request of his attorney. Claimant described his work-related accident to Dr. Munhall. Dr. Munhall gave claimant restrictions of no left over-the-shoulder work, maximum occasional lift, carry, push and pull of ten pounds and no work greater than 18 inches away from the torso. Dr. Munhall diagnosed claimant with left shoulder impingement syndrome and recommended physical therapy. His report also indicates claimant may benefit from left shoulder injections, medication, x-rays and MRI studies. Dr. Munhall opined that claimant's diagnosis is causally related to claimant's work-related injuries.

Respondent claims that claimant is not credible and did not satisfy his burden of proof that he had a work-related injury. Respondent argues that there were no witnesses to claimant's work-related injury. Respondent also contends that claimant lied to Dr. Munhall and in his discovery deposition when he failed to mention a roll-over automobile accident he was involved in six months before his work-related injury. Respondent also suggests that claimant lied again at the preliminary hearing when he told the ALJ that he had forgotten about the roll-over accident. Respondent attempted to introduce as evidence a written statement by a deputy from the Lyon County Sheriff's Department concerning a statement attributed to claimant by the driver of the vehicle in the roll-over accident. This statement had not been produced nor shown to either claimant

or claimant's counsel before the preliminary hearing. The ALJ refused to allow the admission of this written statement, stating:

I am not going to let this in. And the reason I am not going to let this in is because it kind of [is] an ambush, and it is double hearsay about essentially alleging fraud on the part of the claimant. The exhibit also, it's weird to me that a sheriff would investigate an accident the end of June or early July that happened in November without prompting. I mean there is clearly some background here that we don't have and I am not going to admit it.<sup>1</sup>

Respondent also requested that the ALJ delay his decision so that the deposition of Stephanie Owen could be finished. The deposition was scheduled for the day before the preliminary hearing and had been started but was not completed. Claimant had not objected to the scheduling of Ms. Owen's deposition for the day before the preliminary hearing nor to the late notice. But at the preliminary hearing, claimant did object to the respondent's request that the record be held open until the deposition could be completed. Claimant's seven-day demand letter is dated May 27, 2005, and his Application for Preliminary Hearing was filed June 8, 2005. Notice of the July 28, 2005 preliminary hearing was served on June 22, 2005. Counsel for respondent filed his Entry of Appearance on June 24, 2005. Respondent's Notice to Take Deposition of Stephanie Owen on July 27, 2005, was not filed until July 26, 2005. The ALJ refused to delay his decision. The ALJ did not exceed his jurisdiction in making the evidentiary and procedural rulings and, as such, the Board is without jurisdiction to review the ALJ's decisions concerning same on an appeal from a preliminary hearing order.<sup>2</sup>

Respondent's attempts to impeach claimant's credibility notwithstanding, there remains no direct evidence that claimant was injured in any way other than at work on the date and in the manner alleged. To the extent claimant's testimony has been inconsistent, either internally or vis a vis the other witnesses, it has not been about the accident at work. The inconsistencies all relate to tangential matters. That is not to say that credibility is not relevant. To the contrary, it is very important, and in many cases, it is the determinative factor. But the ALJ, who had the opportunity to see the witnesses testify in person, apparently believed claimant's testimony about his accident and injury. After reviewing the entire record compiled to date, the Board agrees and affirms the ALJ. Additional facts may be discovered and additional evidence may be developed, particularly with regard to claimant's credibility, but at this point and based upon the present record, claimant has met his burden of proof.

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<sup>1</sup>P.H. Trans. at 41-42.

<sup>2</sup>K.S.A. 2004 Supp. 44-551(b)(2)(A).

**WHEREFORE**, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Thomas Klein dated August 2, 2005, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of November, 2005.

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BOARD MEMBER

c: David H. Farris, Attorney for Claimant  
Richard J. Liby, Attorney for Respondent and its Insurance Carrier  
Thomas Klein, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director